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CRIMINAL LAW – FUNCTION OF THE JURY – CREDIBILITY OF A WITNESS – VOUCHING TESTIMONY – AS A MATTER OF LAW, A WITNESS IS NOT PERMITTED TO OPINE ON ANOTHER WITNESS'S CREDIBILITY, AS THAT INFRINGES UPON THE JURY'S PROVINCE. A WITNESS IS PERMITTED, HOWEVER, TO DESCRIBE THE FACTUAL CIRCUMSTANCES OF ANOTHER WITNESS'S TESTIMONY, PROVIDED THE TESTIMONY IS RELEVANT. SUCH TESTIMONY FOSTERS, RATHER THAN DETRACTS FROM, A JURY'S FACT-FINDING OBLIGATION TO MAKE CREDIBILITY DETERMINATIONS. HERE, A POLICE DETECTIVE'S REITERATIVE TESTIMONY THAT A PRIOR FACT WITNESS ENTERED INTO A COOPERATION AGREEMENT WITH POLICE AND PENDING CHARGES AGAINST HER WOULD BE DISMISSED IF SHE TESTIFIED TRUTHFULLY WAS NOT VIOLATIVE OF THESE PRINCIPLES.

Facts: On 7 September 2006, an outdoor gathering of people, in a parking lot adjacent to apartments in the Dutch Village area of Baltimore, were listening to contemporary music on a "boom box" and singing along. At some point, two participants, Darrell Artist ("Artist") and Donte Tyner ("Donte"), began fist-fighting. Moments later, shots were fired, with seventeen bullets hitting and killing Artist. Donte and his brother, Tavon Tyner ("Tavon"), were charged with first-degree murder, among other things, in the Circuit Court for Baltimore City.

At trial, the State elicited the fact that two different caliber shell casings were found at the crime scene, leading the police to believe there were two shooters. Moreover, eyewitness Miha Brown testified that Donte and Tavon shot and killed Artist. She had identified the brothers and noted as much on photographic arrays, presented by the police, shortly after the shooting. Eyewitness Latosca McCullough ("McCullough"), who drove at least one of the Tyner brothers from the crime scene on September 7, testified that, at first, she told the police that she was not at the scene and did not have any relevant information. According to McCullough, she was instructed to do so by the Tyner brothers, after the shooting.

Subsequently, when the police charged McCullough with murder, she, represented by counsel, struck a deal with the State's Attorney's Office for Baltimore City to tell the truth. In exchange, the State agreed to drop the charges against her. Pursuant to her cooperation agreement, McCullough stated that, at the scene, she saw "sparks" coming from Tavon's hand and heard Tavon say, after the shooting, that "that [African-American] is

gone from around here."

As its last witness in its case-in-chief, the State called Detective Irvin Bradley ("Detective Bradley"), who investigated the murder. In a chronological fashion, Detective Bradley recalled the process of the police investigation. Eventually, the State's questioning of Bradley turned to McCullough, at which point Detective Bradley stated that, after striking a deal with the State, McCullough gave a pre-trial taped statement to "tell the truth as to what happened on that night that [Artist] was shot and killed, who was involved and umm, the people that was involved and what happened after the murder and, and up until I [arrested] her . . . ." Tavon's counsel objected to the State's line of questioning, regarding Detective Bradley's recollection of the terms of McCullough's cooperation. The jury convicted the Tyner brothers on all counts.

On 11 August 2008, the trial judge denied Petitioners' motion for a new trial and imposed on each defendant a life sentence for first-degree murder, concurrent life sentence for conspiracy to commit murder, and twenty-year sentence for use of a handgun in a crime of violence. Petitioners appealed to the Court of Special Appeals, arguing that Detective Bradley had been allowed to opine, improperly and prejudicially, regarding the truthfulness of McCullough's trial testimony. Moreover, Petitioners argued that Tavon's counsel's objection preserved the issue for both co-defendants, despite Donte's counsel's silence. In an unreported opinion, the intermediate appellate court affirmed, finding that:

> [I]n context, [Bradley's testimony] was offered not as [his] opinion that McCullough was truthful, but to explain that, after initially denying that she was at the scene of the murder and being charged with the crime, she gave the statement that included admission that she saw Tavon firing a gun.

The intermediate appellate court also found that Tavon's counsel's objection did not preserve the issue for Donte. The Court of Appeals granted the brothers' petition for writ of certiorari, *Tyner v. State*, 415 Md. 41, 997 A.2d 791 (2010), to consider the objection to Detective Bradley's testimony, regarding McCullough's cooperation agreement, and whether the question had been preserved for Donte's benefit on appeal.

Held: Affirmed. The trial court did not err, as a matter of law, by refusing to strike portions of Detective Bradley's testimony, relating to McCullough's cooperation agreement with the State. The State used Detective Bradley to verify the existence and terms of a cooperation agreement entered into by one of its key witnesses. Therefore, in these circumstances, Detective Bradley's testimony did not infringe upon the jury's fact-finding obligation.

As a result of this holding, the Court was not required to and did not address the second issue of whether an objection by one co-defendant may be relied upon on appeal by a non-objecting co-defendant.

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State of Maryland v. Constance Walker, No. 48, September Term 2010, filed 21 January 2011. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2011/48a10.pdf

CRIMINAL LAW – INDIGENCY – APPOINTMENT OF COUNSEL – TRIAL COURT'S INDEPENDENT INDIGENCY INQUIRY

NOTWITHSTANDING CHANGES TO THE MARYLAND RULES (CURRENTLY 4-215 AND 4-202) SUBSEQUENT TO *THOMPSON V. STATE*, 284 Md. 113, 394 A.2d 1190 (1978), BECAUSE INDIGENT DEFENDANTS IN A CRIMINAL CASE ENJOY A CONSTITUTIONAL AND STATUTORY ENTITLEMENT TO APPOINTED REPRESENTATION, A TRIAL COURT HAS THE OBLIGATION, UPON LEARNING THAT A DEFENDANT IN A CRIMINAL CASE HAS BEEN DENIED REPRESENTATION BY THE OFFICE OF THE PUBLIC DEFENDER AND THE DEFENDANT MAINTAINS NONETHELESS AN INABILITY TO AFFORD TO RETAIN PRIVATE COUNSEL, TO CONDUCT ITS OWN INDEPENDENT INDIGENCY INQUIRY, IN ACCORDANCE WITH STATUTORY CRITERIA, TO DETERMINE IF THE DEFENDANT IS ENTITLED TO COURT-APPOINTED COUNSEL.

Facts: On 17 March 2008, Walker was charged with second-degree assault. On 8 May 2008, Walker appeared in District Court and prayed a jury trial.

Walker appeared, for the first time, in the Circuit Court for Baltimore County without counsel. Upon questioning by the trial court, Walker stated that she applied for representation by the Office of the Public Defender, but reported that the Public Defender told her she was ineligible for its services. Walker, after stating that she wanted to proceed without an attorney, was then asked if she wanted to request a postponement to obtain private counsel. Walker responded that she "[c]an't afford it." Walker proceeded to trial, self-represented. She was convicted of second-degree assault, and sentenced to a period of incarceration.

Walker appealed timely to the Court of Special Appeals. In a reported opinion, *Walker v. State*, 190 Md. App. 577, 989 A.2d 785 (2010), the intermediate appellate court reversed Walker's conviction, explaining:

> [T]here is no evidence that in adopting Rule 4-202(a)(6)-(7) ["Charging document – Content"], the Court of Appeals was shifting the responsibility from informing a defendant of his constitutionally protected right to counsel from an oral advisement from the trial court to a written advisement stated in the midst of a charging document. . . .
>
> It is hard to imagine . . . that the Court of Appeals would shift notice of the right to court-appointed counsel from a

> finding by the trial court to a written provision stated in the midst of a charging document. Although appellant was informed of her right to have court-appointed counsel in her charging documents when she first appeared in District Court, we do not think that suffices to ensure a defendant his or her constitutional right to counsel.

The State filed timely a Petition for Writ of Certiorari, which we granted to consider whether

> the lower court improperly expand[ed] this Court's limited holding in *Thompson v. State*, 284 Md. 113 (1978), when it found that a trial court must conduct an independent indigence inquiry even though a defendant has neither (1) applied to the clerk of the court prior to trial for appointed counsel as set forth in Rule 4-202(a) nor (2) requested at trial that the trial court appoint counsel.

Held: Affirmed. The Court looked first to former Maryland Rule 723 ("Appearance Without Counsel"), which required formerly the trial court to "[a]dvise the Defendant that if the Public Defender declines to provide representation, the defendant should immediately notify the clerk of the court so that the court can determine whether it should appoint counsel"; and that, before accepting a defendant's waiver of counsel, determine that the defendant comprehends "[t]hat if the defendant is found to be financially unable to retain private counsel, the Public Defender or the court would, if the defendant wishes, provide counsel to represent him." The Court then looked to *Thompson*, in which we held that considering Rule 723's mandatory advisements, "there is the clear duty imposed on the court, in order to decide whether it should appoint counsel, upon the Public Defender declining to do so, to make its own independent determination whether a defendant is indigent and otherwise eligible to have counsel provided."

The Court then turned its attention to Rule 4-215, the current Rule regarding waiver of counsel. Importantly, Rule 4-215, unlike its predecessor, no longer requires the trial court to "[a]dvise the Defendant that if the Public Defender declines to provide representation, the defendant should immediately notify the clerk of the court so that the court can determine whether it should appoint counsel . . . ."; nor must it determine, before accepting a defendant's waiver, that the defendant comprehends "[t]hat if the defendant is found to be financially unable to retain private counsel, the Public Defender or the court would, if the defendant wishes, provide counsel to represent him." Further, Rule 4-202 ("Charging Document –

Content") provides the requirement that a circuit court charging document inform a defendant that "[i]f you want a lawyer but you cannot get one and the Public Defender will not provide one for you, contact the court as soon as possible." The Court noted that the Rule's Committee notes made clear that the committee's intention in formulating Rules 4-215 and 4-202 was to "leave the principal enumeration of the advice concerning counsel to the charging document content rule . . . ."

Against this regulatory and legal history, the State argued that, in light of the modification to the Maryland Rules, when "a defendant appears at trial and fails to request that the trial court determine whether he or she is indigent despite rejection by the [OPD], that defendant must be deemed to have waived the exercise of that right," and that "any obligation to conduct an independent [indigency examination] . . . must be premised on a defendant's act of affirmatively requesting that the court determine whether they are entitled to appoint counsel." Walker asserted, on the other hand, that the trial court cannot deem a defendant to have waived his or her right to court-appointed counsel simply by assuring that the defendant received the charging document and subsequently failing to ask expressly for an indigency inquiry by the court. This is so, Walker argued, because 4-202(a)(7) informs the defendant merely that "[i]f you want a lawyer but you cannot get one and the Public Defender will not provide one for you, contact the court clerk as soon as possible," and does not inform a defendant in a criminal case expressly of his or her right to court-appointed counsel.

The Court agreed with Walker's understanding of a trial court's obligation to conduct an indigency inquiry under the prevailing Maryland Rules, statutory, and constitutional framework. The Court explained that, since the Supreme Court decided *Gideon v. Wainwright*, indigent defendants enjoy a constitutional and statutory entitlement to court-appointed counsel. The Court explained that it sees "no other way to fulfill the courts' constitutionally-mandated duty to provide representation to indigents unable to obtain representation without a trial court, itself and independently, conducting an indigency inquiry when triggered by a defendant's ongoing claim of inability to afford privately-retained counsel." This is true especially, considering the Court's recent decision in *Office of the Public Defender v. State*, 413 Md. 411, 993 A.2d 55 (2010), in which the Court noted that, because the courts are the "ultimate protector" of the constitutional right to counsel, the Public Defender's indigency determination is not final. In this case, because the trial court conducted no inquiry into whether Walker was "indigent," after she informed the court that the Public Defender found her ineligible, but she claimed she could not afford to retain counsel, it committed reversible error.

Regarding the appropriate remedy, the Court held that a

limited remand to determine whether Walker was, in fact, indigent at the time of her trial in 2008 would be inappropriate. The Court explained that although Walker's financial state in 2008 was static, it may not be readily ascertainable, and it should not require her to meet that burden. Further, the Court relied on language from cases holding that a limited remand is inappropriate where "the error adversely affected the defendant's right to fair trial." Finding that the trial court's error affected Walker's right to a fair trial, the Court directed remand to the Circuit Court for a new trial.

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Williams v. State of Maryland, No. 16, September Term 2010. Opinion filed January 5, 2011 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2011/16a10.pdf

CRIMINAL LAW - PUBLIC SAFETY ARTICLE 5-301

Facts: Charles F. Williams, Jr., sought to overturn his conviction in the Circuit Court for Prince George's County for unlawful possession of a handgun, pursuant to Section 4-203(a)(1)(i) of the Criminal Law Article, Maryland Code (2002), asserting that the handgun regulatory scheme violated his right to "keep and carry arms" under the Second Amendment. During a bench trial before the Honorable Sean D. Wallace, the State presented facts to the effect that a police officer observed Williams "going through a backpack near a wooded area" and placing an object "in the brush area as if he was hiding something." The officer asked Williams what he had hidden in the bushes, and Williams replied "my gun." The police officer recovered a black Glock handgun with 15 rounds in the magazine "in the brush area where he saw [Williams] go." Williams asserted that he had purchased the handgun for "self-defense," but conceded that he failed to file "an application for a permit to carry a handgun."

Judge Wallace found Williams guilty of wearing, carrying, or transporting a handgun in violation of Section 4-203(a)(1)(i) and sentenced him to three years' incarceration, with two years suspended. The Court of Special Appeals affirmed. Before the Court of Appeals, as he did in the Circuit Court in a "Motion to Dismiss Indictment," and in his brief before the Court of Special Appeals, Williams asserted that the prohibition in Section 4-203(a) against wearing, carrying, or transporting a handgun without a permit and outside of one's home, infringed upon his Second Amendment right "to keep and bear arms." He contended that the Supreme Court opinions in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and *McDonald v. City of Chicago*, __ U.S. __ , 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), established a general "right of persons to keep and bear arms for lawful purposes." Williams further argued that Sections 5-301 *et seq*. of the Public Safety Article, Maryland Code (2003), as well as Title 29, subtitle 3 of the Code of Maryland Regulations, together governing handgun permitting, impose an impermissible burden on citizens seeking to exercise the right to "keep and carry a handgun."

The State countered that the opinions in *Heller* and *McDonald* together stand for the proposition that, pursuant to the Second Amendment, "states may not generally prohibit the possession of a handgun in the home for the purpose of self-defense, but remain free to enact reasonable restrictions on the possession and use of firearms." The State also asserted that the statutory scheme

embodied in Section 4-203 is eminently reasonable, because Section 4-203(b)(6) expressly permits wearing, carrying, or transporting a handgun in the home. Regarding Sections 5-301 *et seq.* of the Public Safety Article, as well as Title 29, subtitle 3 of the Code of Maryland Regulations, governing carry permitting, the State noted that Williams's argument regarding the futility of applying for a handgun carry permit was without merit, because nearly 93 percent of handgun permit applicants from 2006 to 2009 were issued permits.

Held: The Court of Appeals affirmed. The Court reasoned that Section 4-203(a)(1)(i) of the Criminal Law Article, of which Williams was convicted, prohibits "wear[ing], carry[ing], or transport[ing] a handgun, whether concealed or open, on or about the person," in public, without a permit. Sufficient evidence was adduced to demonstrate that Williams was wearing, carrying, or transporting a handgun in public, and Williams had conceded that he had not obtained, or even applied for, a permit. The Court rejected Williams's attempts to bring his conviction within the ambit of *Heller* and *McDonald*, because both cases emphasized that the Second Amendment is applicable to statutory prohibitions against home possession, the dicta in *McDonald* that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home," notwithstanding. __ U.S. at __ , 130 S. Ct. at 3044, 177 L. Ed. 2d at 922. Although Williams attempted to find succor in this dicta, the Court reasoned that "it is clear that prohibition of firearms in the home was the gravamen of the certiorari questions in both *Heller* and *McDonald* and their answers. If the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly."

The Court emphasized that Williams was convicted of wearing, carrying, or transporting a handgun in public, rather than for possession of a handgun in his home, for which he could not be prosecuted under Section 4-203(b)(6). It is the exception permitting home possession in Section 4-203(b)(6) that takes the statutory scheme embodied in Section 4-203 outside of the scope of the Second Amendment, as articulated in *Heller* and *McDonald*. Section 4-203(b)(6) clearly permits wearing, carrying, or transporting a handgun "by a person on real estate that the person owns or leases or where the person resides," without registering or obtaining a permit, wholly consistent with *Heller*'s proviso that handguns are "the most preferred firearm in the nation to keep and use for protection of one's home and family." 554 U.S. at __ , 128 S. Ct. at 1217-18, 171 L. Ed. 2d at 689.

Finally, the Court held that Williams lacked standing to challenge Section 5-301 *et seq.* of the Public Safety Article, Maryland Code (2003), as well as COMAR 29.03.02.04, governing carry permitting, because he had failed to even apply for a

permit to wear, carry, or transport a handgun.

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State of Maryland v. Fabian Andre Shim, No. 18, September Term, 2010, filed on January 25, 2011. Opinion written by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/18a10.pdf

CRIMINAL LAWV – VOIR DIRE – PROSPECTIVE JURORS – BIAS TOWARDS THE CRIMINAL CHARGES

CRIMINAL LAW–JURY INSTRUCTION–FLIGHT INSTRUCTION

Facts: Reina Tasha Lynch, the mother of Fabian Shim's daughter, was murdered while working as a security guard. Shim was arrested and charged with first degree murder. During jury selection, Shim's counsel requested the court to ask the panel members whether they had "such strong feelings concerning the violent death of another human being that you would be unable to render a fair and impartial verdict based solely on the evidence presented?" The court declined to ask this question. After the trial, the Court instructed the jury members that they may infer guilt from Shim's "flight" after the commission of the crime, although the evidence showed only that the perpetrator departed from the crime scene. The trial court overruled Shim's counsel's objection to the flight instruction. The jury convicted Shim of first degree murder, and he timely appealed to the Court of Special Appeals. The intermediate appellate court disagreed with the trial court's rulings with regard to both the voir dire question and the jury instruction, and overturned the conviction.

Held: Court of Special Appeals affirmed, remanded for new trial. The potential for bias exists in most crimes, and thus we will require *voir dire* questions which are targeted at uncovering these biases. When requested by a defendant, and regardless of the crime, the court should ask the general question, "Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts." A proposed *voir dire* question need not be in perfect form, and the court is free to modify the proposed question as needed. The holding in *Curtin v. State*, 393 Md. 593, 600; 903 A.2d 922, 926 (2006), did not signal a "crime-by-crime" approach to voir dire questions regarding bias towards the charges, and that holding is limited to its facts. The trial court further abused its discretion by giving an instruction to the jury regarding the flight by the defendant. The evidence did not show "flight" by the perpetrator; only departure.

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In Re: Adoption/Guardianship of Cadence B., No. 21, September Term, 2010. Oponion filed on November 22, 2010 by Adkins, J.

http://mdcourts.gov/opinions/coa/2010/21a10.pdf

FAMILY LAW – CHANGE OF PERMANENCY PLAN FROM REUNIFICATION TO "OPEN ADOPTION" – CONTINUED PATTERN OF PARENTAL NEGLECT

Facts: Following years of parental neglect by Petitioner, the juvenile court determined that it would not be in the best interests of Petitioner's three-year-old daughter to remain in foster care in the hopes that she might someday reunite with her father. Rather, after considering all of the requisite statutory factors, the court decided that changing the permanency plan to "open adoption" was in the daughter's best interest. Petitioner lost custody of his daughter when she was only four months old, after the Charles County Department of Social Services ("the Department") received reports that the daughter and her half-brother were being neglected. Because of Petitioner's history of neglect, he had already lost custody to all five of his other children and his parental rights as to three of those children were involuntarily terminated. Moreover, it seemed that Petitioner had not cured his neglectful behavior. Petitioner had moved into a home in Pennsylvania that was four hours away from his daughter and could not be monitored by the Department of Social Services, even though she and her five siblings all resided in Maryland. Also, despite the best efforts of the Department to facilitate visitation, Petitioner traveled to see his daughter only 18 out of 561 days. As a result, the juvenile court was faced with keeping the daughter in "foster care limbo" until Petitioner could prove that future neglect would not occur, or changing her permanency plan so that she could be openly adopted by the foster parents to whom she had bonded. Petitioner appealed to the Court of Special Appeals, and in an unreported opinion, the intermediate court affirmed the juvenile court. He then sought relief in the Court of Appeals.

Held: The Court of Appeals affirmed, holding that the juvenile court did not err in changing the child's permanency plan from reunification to "open adoption." It explained that the juvenile court considered all of the requisite factors, and the evidence clearly showed that Petitioner continued to willfully absent himself from any meaningful contact with his daughter. Despite Petitioner's expressed desire for reunification with his daughter, he chose to move out-of-state to a home that could not be monitored by the Department and rarely traveled back to this State to take advantage of Department-sponsored visitation. The juvenile court understood that unless it changed the child's permanency plan, she would remain in foster care and could not achieve the permanence that it deemed to be in her best interest. The court needed to fashion an alternative plan, and "open adoption" would allow the child to be

placed in a stable home, while still allowing parental visitation.

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In Re: Adoption/Guardianship of Amber R. and Mark R., No. 134, September Term, 2009. Opinion filed on January 24, 2010, by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/134a09.pdf

FAMILY LAW – PARENTAL DUTIES & RIGHTS – TERMINATION OF RIGHTS – INVOLUNTARY TERMINATION

Facts: Petitioner Cathy F. ("Ms. F.") is the parent of Respondents Amber R. and Mark R. (the "Children"), who have each been adjudicated to be a Child in Need of Assistance by the Circuit Court for Baltimore City. Ms. F.'s long history of substance abuse and employment and housing issues led Respondent the Baltimore City Department of Social Services (the "Department") to intervene in her family situation. Ultimately, Ms. F. was unable to stabilize her home life, prompting the Department to pursue guardianship of the Children. The juvenile court, in evaluating Ms. F.'s fitness as a parent, found by clear and convincing evidence that she was an unfit mother, and that it would be in the Children's best interests to terminate her parental rights. The court took into account Ms. F.'s failure to comply with numerous case plans provided by the Department, including her refusal to attend parenting classes or suggested drug treatment programs. Even though Ms. F. claimed to have attended drug treatment on her own, she would not supply the Department or the juvenile court with any corroborating documentary evidence, and her testimony was conflicting as to how long she had been clean.

Ms. F. appealed the juvenile court's decision, and in an unreported opinion, the Court of Special Appeals affirmed. She then sought relief in the Court of Appeals. On appeal, Ms. F. both proposed that the Court superimpose a four-factor test onto the statutory scheme governing termination of parental rights and challenged the juvenile court's application of the existing scheme to her case.

Held: The Court of Appeals affirmed the decision of the intermediate appellate court. The Court rejected Ms. F.'s proposed test, explaining that the General Assembly's extensive list of factors, when considered in the light of the standing presumption favoring parental rights, reflect the spirit that termination is an alternative of last resort, and is not to be taken lightly. Thus, the Court concluded that, to the extent that Ms. F.'s test was designed to protect parental rights, those rights are adequately guarded by Section 5-323 of the Family Law Article. The Court also held that the juvenile court did not err in applying the existing statutory factors to this case, and that there was ample evidence to support its conclusions. Finally, the juvenile court also did not err in drawing inferences from Ms. F.'s failure to present evidence on her sobriety. While the

Department maintained the burden of persuasion at trial, it was permissible to shift the burden of production to Ms. F., and to find against her when she could not produce the relevant evidence.

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In Re: Adoption/Guardianship of Ta'Niya C. , No. 133, September Term, 2009. Opinion filed on November 22, 2010 by Adkins, J.

http://mdcourts.gov/opinions/coa/2010/133a09.pdf

FAMILY LAW – TERMINATION OF PARENTAL RIGHTS – FAMILY LAW ARTICLE § 5-323 – "BEST INTERESTS OF CHILD" IS PARAMOUNT CONSIDERATION FOR JUVENILE COURT

Facts: In this termination of parental rights case involving a five-year-old girl, the juvenile court proceeded under the assumption that the Court of Appeals decision in *In re Adoption/Guardianship of Rashawn H. and Tyrese H.*, 402 Md. 477, 937 A. 2d 177 (2007), "changed the landscape" by requiring a finding of parental unfitness or exceptional circumstances before a court could order termination of parental rights, regardless of whether that course was in the best interest of the child. Thus, even though the court found that the mother was, at present, incapable of taking care of her child and that removing the child from her foster home would be detrimental to the child's best interests, the court decided not to terminate parental rights because it could not find that the mother was unfit or that exceptional circumstances existed that justified severance of the parental tie. The court based its decision primarily on the finding that the Department had returned the child's older sister to her mother, and reasoned that if the home was suitable for one child, it must be appropriate for the other.

In an unreported opinion, the Court of Special Appeals affirmed the juvenile court's decision, stating that "notwithstanding [the juvenile court judge's] colorful description of the holding in *Rashawn*, he remained focused on the appropriate legal standard and considered the relevant statutory factors." The Court also held that the juvenile court did not abuse its discretion as "a fair reading of the court's ruling discloses that the circuit court judge's puzzlement that [DSS] had returned appellant's sibling to her mother was not a decisive factor in his analysis[,]" and the court's finding that Ms. L. was presently unfit to be Ta'Niya's permanent custodian was not inconsistent with its finding that Ms. L. was not "so unfit as to lose parental rights." Ta'Niya petitioned the Court of Appeals for a Writ of Certiorari, which was granted.

Held: The Court of Appeals reversed. With the understanding that a juvenile court is authorized by statute to terminate parental rights upon certain conditions, and after certain findings are made, the Court recognized that, although the paramount consideration identified in the statute, as set forth in subsection (b), is the "best interests of the child," constitutional and common-law rights of parents require consideration of countervailing factors that can make the "best interest" analysis somewhat circuitous. Judge Wilner, writing

for this Court in *In re Adoption/Guardianship of Rashawn H. and Tyrese H.*, 402 Md. 477, 937 A. 2d 177 (2007), undertook a comprehensive review of Termination of Parental Rights ("TPR") cases, as well as those involving claims by third parties to custody of children in an effort to reconcile some seeming inconsistencies in our decisions. *Id*. at 494, 937 A.2d at 189. He concluded that "our case law has been clear and consistent, that, even in contested adoption and TPR cases . . . the best interest of the child remains the ultimate governing standard." *Id*. at 496, 937 A.2d at 189. The Court explained that this opinion was invaluable for achieving an understanding of the law in this area.

Yet, the Court also acknowledged that, in some of its prior decisions, it struggled to define how parental unfitness, exceptional circumstances and the child's best interest analyses relate to one another. *Compare Shurupoff v. Vockroth*, 372 Md. 639, 662, 814 A.2d 543, 557 (2003) (stating that the child's best interest is the "ultimate, determinative factor" in custody disputes) *with McDermott v. Dougherty*, 385 Md. 320, 418, 869 A.2d 751, 808 (2005) (stating that "the constitutional right [of the parent] is the ultimate determinative factor."). Ultimately, however, the Court concluded that a close examination of the law in this area, including *Rashawn*, confirmed that the child's best interest is the prevailing standard in these determinations.

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Robert Lamont Ireland v. Bobby Shearin, No. 26, September Term, 2010. Opinion filed on December 20, 2010 by Adkins, J.

http://mdcourts.gov/opinions/coa/2010/26a10.pdf

STATUTORY INTERPRETATION – MARYLAND PUBLIC INFORMATION ACT – OFFICIAL CUSTODIAN'S DENIAL OF INMATE'S REQUEST TO ACCESS RECORDS

Facts: Appellant Robert Lamont Ireland, an inmate at the North Branch Correctional Institution ("NBCI"), submitted a request under the PIA to the office of Warden John Rowley. Upon receipt of this request, Rowley directed Ireland to request records from the individual departments that housed those records rather than the warden himself. Ireland filed a complaint alleging that Rowley violated his duties as the custodian of records for the NBCI under the PIA and seeking damages. The Circuit Court dismissed this complaint and Ireland timely appealed. On its own initiative, the Court of Appeals issued a writ of certiorari to consider whether Circuit Court erred in dismissing Ireland's complaint.

Held: The Court of Appeals vacated the Circuit Court's decision and remanded the case to that court, holding that the warden's response was an improper denial of Ireland's application. Understanding that the PIA reflects the need for wide-ranging access to public records, the Court explained that the statute should be construed in favor of disclosure for the benefit of the requesting party. Moreover, the PIA required the warden, the official custodian of the requested records, to either grant the application and produce the records, or deny it with a proper explanation. The Act permitted referral only if "the individual to whom the application is submitted is *not the custodian* of the public record[.]" Accordingly, although the PIA placed the burden of properly requesting documents on Ireland, the burden of collecting those documents fell upon Warden Rowley.

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Reverend Daki Napata v. University of Maryland Medical System Corporation, No. 5, September Term, 2010. Opinion filed on January 24, 2010 by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/5a10.pdf

STATUTORY INTERPRETATION – PUBLIC ACCESS TO RECORDS – APPLICABILITY OF PUBLIC INFORMATION ACT TO UNIVERSITY OF MARYLAND MEDICAL SYSTEM

Facts: Pursuant to Maryland's Public Information Act ("PIA"), Reverend Daki Napata submitted a request to Respondent University of Maryland Medical System ("UMMS") to view certain records relating to the construction of a UMMS building. UMMS denied the request on the grounds that it was not an agency or division of the State, and thus not subject to the PIA. Napata then appealed to the Circuit Court for Baltimore City for assistance, but was unsuccessful, and the Court of Special Appeals later affirmed the trial court's judgment. Napata then filed a Petition for a Writ of Certiorari in the Court of Appeals, which was granted.

Held: The Court of Appeals affirmed, holding that, although UMMS was an instrumentality of the State, the entity's enacting statute expressly exempted it from the PIA. When determining whether an entity is an "instrumentality of the State" for purposes of the PIA, a court must examine "[a]ll aspects of the interrelationship between the State and the statutorily-established entity[.]" Courts must consider a number of factors, including the degree of control exercised by the State over the entity. Here, the Court held that "the attributes of UMMS's relationship with the State that point to its being an instrumentality of the State predominate over those pointing to its private character, for purposes of the corporation's inclusion in the scope of the PIA." UMMS did not exist until the State assets were transferred to the corporation. Its aim of providing health care to the local community, as well as a teaching hospital to University students, and Maryland residents serves a public purpose. Moreover, the State remains a visible and compelling force in UMMS's operations. All voting members on UMMS's Board of Directors are appointed by the Governor, and two of these flow from nominations by the respective leaders of each legislative chamber. Additionally, unlike an independent hospital, UMMS is not free to compete with the University for private gifts or private or federal grants, and its annual contracts must be approved by the Regents of the University. Should UMMS become financially unstable, the Treasurer may loan State funds to UMMS as necessary. Finally, the Regents and the Board of Public Works have the power to dissolve UMMS if they determine that it is not fulfilling its purpose. In that event, UMMSs' assets will revert to the State.

Yet, notwithstanding its instrumentality status, UMMS's enacting statute shielded the entity from any laws affecting only governmental or public entities. Thus, as the PIA was a law affecting only public entities, UMMS was not subject to it, and UMMS's denial of Napata's PIA request was proper.

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State of Maryland v. Dean Cates, Randy Kucsan, Bill Tran, Dana Way, No. 107, September Term, 2009, filed on January 24, 2011. Opinion written by Adkins, J.

http://mdcourts.gov/opinions/coa/2011/107a09.pdf

TRANSPORTATION — EMERGENCY VEHICLES — TRAFFIC VIOLATIONS — SPEED MONITORING PROGRAMS — DUE PROCESS

Facts: As part of its effort to enforce traffic laws, the County uses speed monitoring systems. Because the recordings cannot identify the driver, only the vehicle, citations can be potentially issued to owner when a non-owner was operating the vehicle. The authorizing statute allows the Department to reissue a citation to a non-owner, provided that the Department complete certain procedures in the District Court. The Respondents are police officers (the "Officers") who were recorded speeding in 2008 while on duty and driving official police vehicles. The Department determined that the Officers were not responding to an emergency at the time of the violation, and reissued in the Officers' names without following the statutory procedures.

The Officers were found guilty in District Court, and received a *de novo* trial on appeal to the Circuit Court At trial, the Officers did not dispute that the speed cameras were properly functioning, nor the accuracy of the Department's finding that they were not responding to an emergency. Instead, the Officers advanced two due process arguments, each based on a concept of justified speeding. The trial court agreed with the Officers, and dismissed the charges on the grounds that the Department violated their due process rights through its informal investigation policy for determining whether violations ought to be reissued.

Held: Police officers are subject to the so-called "rules of the road,"and must obey traffic laws, except while (1) responding to an emergency call; (2) pursuing a violator or suspected violator of the law; or (3) responding to, but not while returning from, a fire alarm. If an officer is engaged in one of these activities, she may exceed the speed limit so long as she
uses her vehicle's sirens and flashing lights, and drives with due regard for the safety of all persons. Except in this limited situation, police officers have no immunity for traffic violations.

The procedure used by the Department to identify the officers in this case did not violate their due process. First, the In this case, the Officers demonstrated no delay in receiving notice caused by the Department's alternate procedure. Although an inordinate delay might deprive an officer of due process, the Officers received notice of the charges at least as early as when they were interviewed by the Department, well before the

citations were reissued in their names. The Officers were no worse off than a regular citizen who could be issued a citation months after the violation date.

More generally, due process does not always require strict adherence to statutory procedures. A due process claimant must still show some unfairness or arbitrariness caused by a statutory violation. Given the Officers' limited interest in an initial ex parte District Court proceeding, the absence of a risk of mis-identification, and the later opportunity for a District Court trial, as well as the right of *de novo* appeal to the Circuit Court, there was no due process violation. Due process does not require strict adherence to a statute by an administrative agency where such adherence would provide no additional guarantees of fairness, notice, or an opportunity to be heard.

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COURT OF SPECIAL APPEALS

Kim v. Maryland State Board of Physicians, No. 1749, Sept. Term, 2009, filed December 3, 2010. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2010/1749s09.pdf

ADMINISTRATIVE LAW - DISCLOSURES ON MEDICAL LICENSE APPLICATION - MEDICAL CASE RESOLUTION CONFERENCE (CRC) VIOLATION - INTERPRETATION OF 'WITHIN THE PRACTICE OF MEDICINE' UNDER HO § 14-404(a)(3) and § 14-404(a)(11) - SUFFICIENCY OF EVIDENCE TO SHOW WILLFULL CONDUCT IN VIOLATION OF HO § 14-404(a)(11) and (36)

Facts: Appellant had practiced medicine in Maryland since 1977. His native language is Korean. To receive his medical license in Maryland, appellant completed a residency program conducted in English and passed a written and oral English proficiency test. In 2005, appellant was a defendant in a medical malpractice suit pending in the Circuit Court for Frederick County, captioned Wagner v. Kim, Civil No. C-05-1251. The plaintiff in that case had filed a complaint against appellant on April 19, 2005. Appellant, through counsel, answered the complaint a month later.

Nonetheless, when appellant later completed his license renewal application on August 15, 2006, he claimed he was not involved in any malpractice cases.

In November 2006, the Board learned that, contrary to the statements made in his license renewal application, appellant was involved in the Wagner case. The Board learned this during the course of a separate standard of care proceeding initiated by the Board against appellant. In that proceeding, a 'Case Resolution Conference' ('CRC') to explore resolution of the issues prior to an evidentiary hearing was scheduled for December 6, 2006. Prior to December 6, in a telephone conversation, appellant's attorney advised the administrative prosecutor that appellant would not be able to attend the CRC on that date because he had a court appointment in Frederick County. The administrative prosecutor mentioned the conversation to a Board investigator, who then searched the internet and found that appellant was involved in the Wagner case. Based on this finding, the Board charged appellant with violating the following subsections of the Maryland Medical Practice Act, Title 14 of the Health Occupations Article of the Maryland Code: (1) Maryland Code, Health Occ. § 14-404(a)(3), prohibiting unprofessional conduct in the practice of medicine; (2) Id. § 14-404(a)(11), prohibiting the willful filing of a false statement in the practice of medicine; and (3) Id. § 14-404(a)(36), prohibiting the willful making of a false representation when making an application for licensure or any

other application related to the practice of medicine.

The ALJ issued a Proposed Decision upholding the Board's charges and recommending that appellant be reprimanded, fined, and required to take an ethics course. Appellant filed exceptions with the Board, which adopted the ALJ's findings and orders. In addition, the Board placed appellant on probation. Appellant petitioned for judicial review in the circuit court. The circuit court affirmed.

On appeal, appellant argued that (1) the ALJ failed to address evidence that the Board impermissibly used the statement made by appellant's attorney concerning the CRC scheduling to charge appellant with the violations at issue in this case; (2) the ALJ incorrectly found that appellant's conduct was 'within the practice of medicine,' as required under § 14-404(a)(3) and § 14-404(a)(11); (3) there is insufficient evidence to show that appellant's conduct was willful, in violation of § 14-404(a)(11) and (36); and (4) the sanction imposed on appellant was excessive.

Held: The Court of Special Appeals also affirmed, rejecting all of appellant's arguments.

The Court held that the Board's use of appellant's attorney's statement was permissible because, among other things, the comment was not substantive. It related only to scheduling logistics.

The Court concluded that appellant's false statements on his license application were made 'within the practice of medicine' because (1) appellant's misconduct was sufficiently intertwined with the 'effective delivery of patient care;' (2) the Board interpreted 'within the practice of medicine' to encompass appellants' actions, and appellate courts should defer to the Board's interpretation of a statute that the Board administers; and (3) Maryland appellate courts have consistently rejected narrow interpretations of the phrase 'in the practice of medicine.'

The Court found that appellant's violations were 'wilful' because substantial evidence indicated that he intentionally, non-accidentally, and non-inadvertently, made the false statements on his application. The Board did not need to show specific intent to deceive in order to show that the false statements were made willfully.

Last, the Court determined that the Board's sanctions were neither arbitrary nor capricious.

* * *

Jamal Logan v. LSP Marketing Corporation, et al., No. 2833, September Term 2009, filed December 29, 2010. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2010/2833s09.pdf

CIVIL PROCEDURE – DISCOVERY – DISCLOSURES – SANCTIONS

Facts: This appeal arises from a discovery issue in a lead paint poisoning case. Appellant, Jamal Logan, filed suit in the Circuit Court for Baltimore City against 22 defendants, including appellees, LSP Marketing Corporation and Basilio Lachica (collectively, "LSP"). After receiving untimely and incomplete answers to the interrogatories it propounded upon Logan, LSP filed a motion for sanctions, seeking dismissal of the action with prejudice or, in the alternative, exclusion of all but one of Logan's experts from testifying at trial. According to LSP, Logan's answer to one interrogatory failed to state "the substance of the findings and opinions to which the expert[s] [are] expected to testify, and a summary of the grounds for each opinion." Logan filed an opposition to the motion for sanctions, along with a request for a hearing. Without holding a hearing, the court denied LSP's request for dismissal but granted the motion for sanctions by excluding all but one of Logan's experts ("Order").

The case proceeded to trial where, as a preliminary matter, Logan, for a third time, unsuccessfully asked the court to reconsider its Order. Thereafter, Logan's counsel stipulated that Logan "could not proceed to trial and was unable to establish a *prima facie* case under the parameters existing as a result of the [court's Order]." Logan requested a postponement of trial, which the court denied. One of the defendants then moved for summary judgment. Finding "no dispute as to material fact," the court granted summary judgment "as to all claims asserted against all Defendants by [] Jamal Logan." This appeal followed.

Held: Affirmed. When responding to interrogatories, a party who fails to include the substance of the proposed experts' findings and opinions, as well as a summary of the grounds for each expert's opinion, and merely provides "boilerplate" expert designations, does not substantially comply with the requirements of Maryland Rule 2-402(g)(1)(A). Therefore, the circuit court did not abuse its discretion when it granted LSP's motion for sanctions without a hearing, and excluded all but one of Logan's experts from testifying at trial.

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In Re: Jeremy P., No. 1820, September Term, 2009, decided on January 19, 2011. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2011/1820s09.pdf

CONSTITUTIONAL LAW - UNITED STATES CONSTITUTION, AMENDMENT IV - SEARCH AND SEIZURE - ACCOSTING - *TERRY* STOP:

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968); *Ransome v. State*, 373 Md. 99 (2003) (holding "We understand that conduct that would seem innocent to an average layperson may properly be regarded as suspicious by a trained or experienced officer, but if the officer seeks to justify a Fourth Amendment intrusion based on that conduct, the officer ordinarily must offer some explanation of why he or she regarded the conduct as suspicious; otherwise, there is no ability to review the officer's action.").

Facts: An eight-year veteran detective assigned to the Prince George's County Gang Unit, testified that, at approximately 1:00 a.m., he was on plainclothes patrol in an unmarked vehicle "doing a saturation of the area due to recent gang taggings (placing graffiti on a fence or wall or sign signifying particular gangs) in the area and armed robberies in the area." The detective spotted then seventeen-year-old Jeremy P. and a companion as they exited a McDonald's parking lot on foot. The Detective parked his vehicle and watched them from across the road, at a "fairly close" distance. The sum total of appellant's actions given by the detective to justify a *Terry* stop was that the appellant "kept playing around with his waistband area. We call that a high risk area. And he kept making firm movements in his waistband area. . . . He would have been adjusting hisself(sic). He had a shirt on. He would have been adjusting hisself (sic) from the front area, you know, fixing (indiscernible) the shirt." A subsequent pat-down uncovered an 8-caliber revolver.

Held: The juvenile court erred in denying appellant's motion to suppress the evidence and statement obtained pursuant to his stop of appellant because the detective failed to articulate an adequate factual basis for the *Terry* stop in either his testimony or his in-court demonstration.

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Copeland v. State, No. 940, Sept. Term, 2009, filed December 2, 2010. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2010/940s09.pdf

CRIMINAL LAW - HEARSAY EXCEPTION - RULE 5-803(b) - THEN EXISTING STATE OF MIND - RULE 5-404(b) - OTHER CRIMES AND BAD ACTS - CONSCIOUSNESS OF GUILT

Facts: After a jury trial, Herbert Copeland, appellant, was convicted of second degree assault. At trial, the court admitted evidence that appellant made threats against the victim and her family to deter the victim from testifying on behalf of the State. The court sentenced appellant to a ten-year prison term with all but three years suspended, and an additional five years supervised probation to commence upon his release. On appeal, appellant contended that the trial court erred in allowing the State to present evidence of the threats.

Held: Finding no reversible error, the Court of Special Appeals affirmed. The Court held that evidence of the threats was admissible under Maryland Rule 5-803(b)(3), a hearsay exception for then-existing states of mind. Further, the court concluded that evidence of the threats was not barred by Maryland Rule 5-404(b), which provides that:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity or absence of mistake or accident.

The court determined that evidence of the threats demonstrated consciousness of guilt, which is an 'other purpose' under Rule 5-404(b).

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Edward Butcher A.K.A. Eddie N. Butcher, Jr. v. State of Maryland, No. 620, September Term, 2009, filed December 22, 2010. Opinion by Rodowsky, J.

http://mdcourts.gov/opinions/cosa/2010/620s09.pdf

CRIMINAL LAW – SENTENCING – CONCURRENT SENTENCES – CALCULATION OF TOTAL SENTENCE WHEN INTERMEDIATE SENTENCE VACATED

Facts: After being convicted on multiple charges, appellant was sentenced to sixty-three years under the following sentencing scheme: A twenty years; B three years, consecutive to A; C ten years, consecutive to B; and D thirty years, consecutive to C. Appellant petitioned for post-conviction relief on the basis that sentence B merged with sentence A. This petition was granted by the circuit court, and sentence B was vacated. A new commitment record was filed that stated that sentence C was consecutive to sentence A, and that the total time to be served was sixty years, a three year reduction from the original sentence.

Appellant then filed a pro se motion to correct an illegal sentence. Appellant argued that, because sentence B was eliminated, and because no explicit relationship existed between sentences A and C, sentence C should run concurrently with sentence A by operation of law. That is, according to appellant, the result of the merger of sentence B into sentence A would be the following sentencing scheme: A, concurrent with (C + (D, consecutive to C)). This would produce a total sentence period of forty years. In support of the principle that, "if two sentences are not expressly made consecutive, they are concurrent," appellant relied on dicta in *Smith v. State*, 23 Md. App. 177, 324 A.2d 902 (1974), and *Palmer v. State*, 193 Md. App. 522, 998 A.2d 361, *cert. denied*. The circuit court denied appellant's motion, and he appealed to this Court.

Held: Affirmed. When one of a series of consecutive sentences is nullified, the next valid sentence begins on the date of the commencement of the invalidated sentence. This principle results from the transitive property that inherently governs the interrelationships between sentences in a series of consecutive sentences. This reasoning was substantively employed in *Wilson v. Simms*, 157 Md. App. 82, 849 A.2d 88, *cert. denied*, 382 Md. 687, 856 A.2d 723 (2004). In that case, Wilson was sentenced to X; Y, consecutive to X; and Z, consecutive to Y. After sentence Y was vacated, Wilson argued that sentence Z should be considered to run concurrently with sentence X. This argument was rejected by the *Wilson* Court because each sentence explicitly was made consecutive to the one before it. Accordingly, sentence Z was consecutive to sentence X, and began when sentence Y was to begin.

In light of the reasoning employed by the *Wilson* Court, and the decisions of most courts outside of Maryland that have considered the issue, this Court held that the effect of merging sentence B into sentence A was that sentence C would run consecutive to sentence A. Accordingly, appellant's total sentence period is sixty years. In so holding, this Court disapproved the dicta relied upon by appellant in *Smith* and *Palmer*.

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State of Maryland v. Gregory Maurice Harding, No. 0083, September Term 2010, filed December 10, 2010. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2010/83s10.pdf

CRIMINAL LAW – STRIP SEARCH – MODALITY ISSUES VERSUS JUSTIFICATION ISSUES – BORDER SEARCHES – INSTITUTIONAL SECURITY – THE EXTREME ENDS OF THE STRIP SEARCH CONTINUUM – THE RELATIONSHIP BETWEEN THE STRIP SEARCH AND THE SEARCH INCIDENT TO LAWFUL ARREST – PARTICULARIZATION

Facts: Two Baltimore County Police Department detectives received a tip from a "reliable informant" that the appellee was selling crack cocaine out of a blue Audi with a particular Maryland tag number in the Towson and Parkville areas. The detectives spotted the Audi with the particular Maryland tag, which the appellee was driving alone, eight days after receiving the tip, and ordered a sergeant to execute a traffic stop on the vehicle. As part of the traffic stop, a K-9 unit was summoned. The dog alerted twice on the Audi, once at the driver's side door and then again on the driver's seat. The appellee was subsequently arrested, and a *Carroll* Doctrine search of the Audi ensued. A "very thorough search" of the vehicle failed to produce narcotics. A search of the appellee produced $1,474 in cash, but no other contraband.

The appellee was then transported to the precinct station. Based on their experience with drug dealers, the detectives believed the appellee was concealing contraband in an area of his body that was not accessible during the search of his clothing. They ordered the appellee to remove his pants. As the appellee was doing so, a baggy of crack cocaine dropped out of them and fell to the floor. The appellee was charged with possession of cocaine with intent to distribute, and moved, pretrial, to suppress the baggy. The trial court judge granted the appellee's motion, ruling that the police did not have a "reasonable articulable suspicion to do the strip search." The State appealed the trial court's ruling.

Held: Reversed. A search incident to lawful arrest does not automatically give rise to a warrantless strip search. The search incident to lawful arrest is justified if there is probable cause to believe that the underlying crime occurred. In addition to probable cause that the underlying crime occurred, the strip search requires particularized suspicion that evidence of that crime will be found on or in the body of the arrestee. The probable cause for the arrest that gives rise to a search incident may contain within it no particularized suspicion for a strip search at all. It may, on the other hand, contain more than enough particularization, so that nothing further is require. Notably, it is not always the case that a narcotics-related arrest will justify a strip search.

The particularized suspicion standard for a strip search was satisfied in this case. Much of the necessary particularized suspicion that the appellee had drugs hidden on or in his person was already part and parcel of the probable cause for his arrest, including the tip received by the detectives identifying the appellee as a seller of narcotics. Further, the appellee was the sole occupant of the vehicle. Finally, the drug-sniffing dog alerted to driver's seat and side-door. Because the search of the vehicle and the appellee at the scene of the traffic stop did not produce narcotics, the probability that the narcotics were located on the appellee's body was substantial.

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Lafontant v. State, No. 1228, Sept. Term, 2008, filed December 1, 2010. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2010/1228s08.pdf

CRIMINAL LAW - VICTIM'S RESTITUTION - CP § 11-603 - PLEA BARGAINS

Facts: Joseph Lafontant, appellant, was convicted in the Circuit Court for Prince George's County of, *inter alia*, manslaughter by vehicle, pursuant to a plea agreement. In the agreement, appellant promised to plead guilty to the charge, and the State, an appellee, assured appellant that it would seek no more than four years of active incarceration. Victim restitution was not part of the agreement.

On January 14, 2008, the circuit court held a plea hearing. Appellant pled guilty to manslaughter, and was convicted. On March 14, 2008, the court held a sentencing hearing. At the sentencing hearing, counsel for Catherine Riley, the victim's representative, an appellee, appeared and requested for the first time that the court order appellant to pay her, i.e., Ms. Riley, nearly $12,000 in restitution. The court postponed the restitution decision, but sentenced appellant to ten-years' imprisonment, all but four years of which were suspended in favor of supervised probation for five years. At a subsequent restitution hearing on July 11, 2008, the court ordered appellant to pay the full amount of restitution.

Appellant argued on appeal that the restitution order should be vacated because it violated his plea agreement. Appellant suggested that restitution was waived because it was not mentioned explicitly in the plea bargain.

Held: The Court of Special Appeals affirmed the restitution order. The Court stressed that under subsection (b) of CP § 11-603, victims have an explicit right to restitution. Thus, appellant could not reasonably have believed that the terms of the bargain impliedly waived the victim's right to restitution. Even assuming that appellant might have understood that the *State* was impliedly waiving its right to request restitution, appellant should reasonably have understood that the *victim* was not. Accordingly, the Court held that the agreement contained neither an express nor an implied waiver of the victim's right to restitution in a criminal and/or civil proceeding.

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Environmental Integrity Project, et al. v. Mirant Ash Management, LLC, et al., No. 1779, September Term 2009, filed December 29, 2010 . Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2010/1779s09.pdf

ENVIRONMENTAL LAW - INTERVENTION AS A MATTER OF RIGHT – MD RULE 2-214 – PERMISSIVE INTERVENTION – ENVIRONMENT ARTICLE TITLE 9 SUBTITLE 3 – ENFORCEMENT ACTION

Facts: Mirant Maryland Ash Management, LLC, and Mirant Mid-Atlantic, LLC (collectively, "Mirant") lease and operate two power plants in Southern Maryland, including the Morgantown Generation Station in Morgantown, Maryland. The Morgantown plant generates electricity through the combustion of coal, which produces waste byproducts (hereinafter referred to as coal combustion byproducts, or "CCBs"), including fly ash. In order to dispose of the fly ash and other waste products created by their power plants, Mirant owns and operates the Faulkner Fly Ash Storage Facility near La Plata, Maryland. On December 18, 2000, MDE and PEPCO, Mirant's predecessor at the Faulkner facility, entered into a Complaint and Consent Order, through which the parties agreed that PEPCO, and subsequently Mirant, would be responsible for installing a water treatment system to address discharges from the fly ash material to surface water and groundwater. Mirant maintains that this water treatment system was put in place and that it was in conformity with MDE regulations.

The Environmental Integrity Project (EIP) is a nonprofit organization based in Washington, DC, that advocates for the enforcement of environmental laws, and the Potomac Riverkeeper (PRK) is a nonprofit organization that advocates for the creation of new laws and the enforcement of existing state and federal laws affecting the Potomac River watershed. On April 2, 2008, EIP and PRK sent a letter to Mirant's leadership notifying Mirant of their intent to sue for violations of the Clean Water Act at the Faulker facility. In its letter, EIP explained that its research indicated that the levels of toxic pollutants being discharged from the facility were in excess of Maryland's water quality criteria, among other violations.

On May 29, 2008, MDE filed a civil enforcement action seeking injunctive relief and civil penalties pursuant to Md. Code Ann. (1982, 2007 repl. vol.), Environment Article §9-339 and §9-342, stating that the "existing leachate collection and treatment systems" put in place at the Faulkner facility "were insufficient to prevent the migration of pollutants from contaminating groundwater and surface waters." On August 21, 2008, EIP, PRK, and five individuals whose homes are located within ten to fifteen miles of the Faulkner facility, filed a motion to intervene as a matter of right, pursuant to Md. Rule 2-

214(a), or in the alternative, for permissive intervention pursuant to Md. Rule 2-214(b). MDE filed a response in support of appellants' motion to intervene, and Mirant filed an opposition thereto. On September 23, 2009, the Circuit Court for Charles County denied the motion to intervene. EIP, PRK and the individual petitioners the noted their appeal to the Court of Special Appeals.

Held: The Court of Special Appeals affirmed the ruling of the circuit court. The Court explained that in order to intervene as a matter of right under Md. Rule 2-214(a), an applicant for intervention must demonstrate that (1) the application for intervention was be timely; (2) the applicant has a sufficient interest in the subject matter of the action; (3) disposition of the action would at least potentially impair the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the existing parties. The Court held that EIP and PRK did not have a sufficient interest in the outcome of an enforcement action by the Maryland Department of the Environment against the owner and operator of a fly ash storage facility, because their claimed interests were protecting the environment, restoring and safeguarding the natural habitats of the Wicomico and Potomac Rivers, and enforcing state environmental laws. The Court held that the individual homeowners, likewise, did not establish a direct and specific interest in the action, because, although they reside within a ten to fifteen mile radius of the facility, they failed to demonstrate that they were personally affected in some way different from any other residents living within a ten to fifteen mile radius of the plant, or from the general public.

With regard to permissive intervention, the Court explained that under Md. Rule 2-214(b), a party may be permitted to intervene in an action upon a timely motion when the person's claim or defense has a question of law or fact in common with the action, and when intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. The Court held that Title 9, Subtitle 3 of the Environmental Article. authorizes MDE—and only MDE—to institute civil actions against violators of the subtitle's clean water laws. In conclusion, the Court held that EIP and PRK failed to show that the circuit court's denial of their motion for permissive intervention was clearly against the logic and effect of facts and inferences before the court, or that it was violative of fact and logic.

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Leon Thomas Coleman v. State, No. 1559, September Term, 2009, decided on December 28, 2010. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2010/1559s08.pdf

REAL PROPERTY - THE DEPOSITS ON NEW HOMES SUBTITLE - FAILURE TO MAINTAIN MONEY IN ESCROW ACCOUNT WHERE LAND AND NEW RESIDENTIAL UNIT ARE NOT CONVEYED SIMULTANEOUSLY

MD. CODE ANN., REAL PROPERTY ARTICLE §10-301 (providing that when a vendor or builder obligates a purchaser to pay and the vender or builder receives any sum of money before completion of a new single-family residential unit which is not completed at the time of contracting the sale, the builder or vendor shall: "(1) Deposit or hold the sum in an escrow account segregated from all other funds of the vendor or builder to assure the return of the sum to the purchaser in the event the purchaser becomes entitled to a return of the sum;(2) Obtain and maintain a corporate surety bond in the form and in the amounts set forth in §10-302 of this subtitle, conditioned on the return of the sum to the purchaser in the event the purchaser becomes entitled to the return of the money; or (3) Obtain and maintain an irrevocable letter of credit issued by a Maryland bank in the form and in the amounts set forth in §10-303 of this subtitle.").

Facts: Appellant, on behalf of Opportunities Investment Group (OIG), a company owned by him and his wife, contracted with ten buyers to build homes on ten lots in a community in Prince George's County known as Kings Grant Court. Appellant was convicted of failure to deposit money in an escrow account in violation of R. P. §10-301. Appellant contended that the evidence was insufficient to sustain his convictions because, to the extent that he had any obligation to escrow funds received from the purchasers, that obligation was extinguished when he deeded the properties to the buyers, and did not continue until he completed construction of the improvements and that the evidence was insufficient to establish beyond a reasonable doubt that OIG did not refund the monies it received from the purchasers.

Held: Judgment of the Circuit Court for Prince George's County reversed. The General Assembly did not intend to include within the coverage of R.P. §10-301, the Deposits on New Homes subtitle, and other similar statutory provisions, construction loan transactions where the land and the new residential unit are not conveyed simultaneously.

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Michelle D'Aoust v. Cindy R. Diamond, et al., Case No. 1708, Sept. Term 2009 filed December 29, 2010. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2010/1708s09.pdf

REAL PROPERTY - FORECLOSURE - TRUSTEE OF SALE - JUDICIAL IMMUNITY - QUALIFIED IMMUNITY - INTENTIONAL TORT - FIDUCIARY DUTY -BREACH OF DUTY -CONSTRUCTIVE FRAUD - ACTUAL FRAUD - MD RULE 2-305

Facts: On April 7, 2008, appellant, Michelle D'Aoust, filed a complaint in the Circuit Court for Harford County, naming as defendants Cindy Diamond, Bruce Brown, and Rosen Hoover, P.A. (collectively, "appellees"), who had acted as trustees pursuant to a petition for sale of appellant's property in a separate matter. Appellant's complaint contained two enumerated counts: one for breach of duty and one for constructive fraud. Within the count for constructive fraud, appellant alleged actual fraud. All counts were premised upon appellees' failure to provide notice of sale and filing a false or incorrect affidavit attesting that proper notice had been sent. Appellees filed a motion to dismiss on June 26, 2008, which the court granted on September 29, 2009.

Held: The Court of Special Appeals reversed the order of dismissal and remanded the case for further proceedings. Although appellees allegedly violated a narrow rule by virtue of a ministerial act—failing to give notice—their position as trustees vested them with discretion and entitles them to qualified immunity from civil liability for tortious conduct within their vested authority. Failure to provide notice as required by statute or rule in a judicial sale constitutes constructive fraud, which is itself a breach of duty. Constructive fraud is not an intentional tort, and therefore appellees' qualified immunity prevents liability from attaching to the conduct supporting that claim. Dismissal of the breach of duty and constructive fraud claims was thus proper. Actual fraud is an intentional tort and thus not subject to the defense of qualified immunity. Although appellant failed to set forth actual fraud as a separate count as required by Maryland Rule 2-305, appellees specifically referenced and controverted actual fraud, so that the claim was adequately pled. Dismissal of appellant's cause of action for actual fraud was therefore erroneous.

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ATTORNEY DISCIPLINE

By and Order of the Court of Appeals dated December 2, 2010, the following attorney has been disbarred by consent, effective December 31, 2010, from the further practice of law in this State:

JAMES GEORGE CHARLES
*

By an Order of the Court of Appeals dated December 29, 2010, the following attorney has been disbarred by consent, effective December 31, 2010, from the further practice of law in this State:

EDWARD C. CROSSLAND
*

By an Order of the Court of Appeals dated January 21, 2011, the following attorney has been suspended, effective immediately, from the further practice of law in this State:

JAMES RUDOLPH BOYKINS
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By and Opinion and Order of the Court of Appeals dated January 24, 2011, the following attorney has been disbarred from the further practice of law in this State:

WALTER CARROLL ELLIOTT
*

By and Order of the Court of Appeals of Maryland dated January 25, 2011, the following non-admitted attorney is excluded from exercising the privilege of practicing law in this State:

SIRINA SUCKLAL
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